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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 760

STATE OF IOWA,
CONSERVATION COMMISSION OF IOWA,
HIGHWAY COMMISSION OF IOWA,
GEORGE CORRIELL, et al.,
Petitioners,

vs.

FEDERAL POWER COMMISSION,
Respondent.

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

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April 1950.

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FEDERAL POWER COMMISSION,
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FIRST IOWA HYDRO-ELECTRIC COOPERATIVE,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

The State of Iowa, the Conservation Commission of Iowa, the Highway Commission of Iowa, George Corriell, and other owners and occupants of lands and homesteads directly affected, respectfully petition for a review on Writ of Certiorari of a decision of the United States Court of Appeals, Eighth Circuit, the opinion in which was filed on December 28, 1949, and a Petition for Rehearing of which was denied on January 20, 1950, by said court. Said decision affirmed an Order of the Federal Power Commission granting and giving a license to the First Iowa Hydro-

Electric Cooperative, Intervenor herein, affirmatively authorizing the construction and operation of a hydro-electric project within the State of Iowa, using the diverted waters from the Cedar River, an interior river of Iowa, for the source of power, over the objections of your petitioners.

OPINION OF COURT.

The opinion of the United States Court of Appeals, Eighth Circuit (R. p. 11) is reported in 178 F. 2d 421. The Orders of the Federal Power Commission involved are set out at United States Court of Appeals Record, pages 91 and 106 respectively, (R. p. 5 (91, 106)) there being two Orders.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 313(b) of the Federal Power Act (16 USCA Sec. 825-l); the Act of June 25, 1948, c. 646; 62 Stat. 928, Judicial Code (28 USCA Sec. 1254).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

United States Constitution, Article I, Section 8, Clause 3;
Amendment 10, United States Constitution;
Federal Power Act, 49 Stat. 838, 16 USCA Sec. 791(a) et seq;
Chapter 469, Code of Iowa, 1946 (On the Record known as Chapter 363, Code of Iowa 1939);
Chapter 246 Laws of 52nd General Assembly of Iowa.

STATEMENT.

The First Iowa Hydro-Electric Cooperative, the Intervenor herein, is a corporation for profit, organized under the provisions of Chapter 390.1, Code of Iowa, 1939 (Exhibit No. 67) now Chapter 499, Code of Iowa, 1946. The Intervenor

filed an application with the Federal Power Commission (R. p. 1) for a license under the provisions of the Federal Power Act. The proposed project includes the construction of a diversion dam across the Cedar River at a point above the Salisbury bridge and below the town of Moscow, consisting of an embankment of about 8000 feet long, and a flanging dike on the west side and upstream from the dam approximately 15,000 feet long, the purpose being to create a reservoir of approximately 11,000 land acres. Substantially all of the water in the Cedar River will be diverted from the reservoir through a canal to be constructed easterly across land approximately 8½ miles. Along the course of this canal there would be constructed a second reservoir consisting of about 920 land acres at Mad Creek, and a third reservoir at the east end of the canal of about 160 land acres on Geneva Creek. At that point there would be a drop of about 95 feet through a power plant to be constructed on land, and from there and through a sluiceway running downstream along the Mississippi River, the diverted water from the Cedar River would be taken and dumped into the Mississippi River below navigation dam No. 16 (R. p. 5, (167-168)).

The Cedar River is an inland river of Iowa and is a tributary of the Iowa river. The Iowa river is also an inland river of Iowa and flows into the Mississippi River. The junction of the Cedar River with the Iowa River is about 29 miles from the junction of the Iowa River with the Mississippi River. The proposed diversion dam would be located approximately 20 miles upstream on the Cedar River from its junction with the Iowa River. (R. p. 5, (153)). The Cedar River below the diversion dam would virtually be destroyed and at most would be nothing more than a mere rivulet except during spring thaws and rains. The only purpose of the proposed project is to construct an electric power plant to generate electric energy to be sold commercially. The

plan presented in the evidence and on the record does not include any transmission lines to carry the electric energy generated away from the plant. (R. p. 5, (161-171)).

A map prepared by the Bureau of Power of the Federal Power Commission and in evidence as Exhibit 1 of Exhibit No. 106 is reproduced on the last page of the Appendix, so that the Court may visualize and better understand the proposal.

Each of the petitioners herein filed petitions of intervention with the Federal Power Commission and were admitted to participation in the proceedings by that Commission. The Petition of Intervention of the State of Iowa and amendments thereto will be found in the Petitioners Record below beginning with page 6 and extending to page 28. (R. p. 5, (6-28)). The Objections of the Highway Commission of Iowa are set out in the Petitioners Record below beginning with page 32. (R. p. 5, (32)). The Petition of Intervention by the property owners directly affected is set out in the Petitioners Record beginning with page 39. (R. p. 5, (39)). The Board of Supervisors of Muscatine County, Iowa, in which County the project would be located, filed with the Commission a Resolution protesting the granting of the license. That Resolution is set out in the Petitioners Record beginning with page 44. (R. p. 5, (44)).

REASONS FOR REVIEW.

A review of the Opinion and decision of the United States Court of Appeals for the Eighth Circuit affirming the Orders of the Federal Power Commission complained of is necessary for the following reasons:

a. The action of the Federal Power Commission in affirmatively authorizing the construction of the proposed project, and the decision of the lower Court in affirming that Order, are violative of the Commerce Clause of the Constitution of the United States, and are in conflict with

fundamental principles stated in applicable decisions of this Court.

b. The Opinion and decision of the Court of Appeals is on an important question of Federal law which has not been but should be settled by this Court under the facts and circumstances of this case; said decision of the Court of Appeals has decided Federal questions in a way which is in conflict with applicable decisions of this Court; and the Court has sanctioned a departure from the usual course of judicial proceedings and hearings in that the Federal Power Commission denied the right of your Petitioners to present evidence and to be heard upon the question of the jurisdiction, power and authority of the Commission to affirmatively license and authorize the construction of the proposed project.

c. The United States Court of Appeals in this case has decided questions of extreme general importance and of substance relating to the construction and application of the powers granted to the Federal Government by the Constitution of the United States and particularly the Commerce Clause thereof, and such questions should be settled by this Court for the guidance, instruction and information of the respective States of the United States. Further, the Court of Appeals herein has not given proper effect to the prior applicable decisions of this Court and particularly the Opinion and Decision of this Court in *First Iowa Hydro-Electric Cooperative, Petitioner vs. Federal Power Commission, Respondent, State of Iowa, Intervenor,* 328 U. S. 152, 90 L. ed. 1143.

d. The underlying questions involved in this case are of great public importance, and the ultimate decision of this Court will determine the need, if any, for further Congressional action by Congress upon said subject matter.

QUESTIONS PRESENTED.

The specific questions presented are:

1. Whether the Court of Appeals erred in refusing and in failing to pass upon the constitutional and jurisdictional questions presented on the Review in that Court, and whether the Federal Commission erred in refusing to receive evidence upon and to pass upon the constitutional and jurisdictional questions pleaded and raised by your Petitioners.

The following are the specific matters which were presented and which your Petitioners submit should have been decided, and if decided according to your Petitioners' contentions, then the Orders of the Federal Power Commission complained of herein would resultantly be reversed and the application for a license would be dismissed.

a. The Cedar River is not navigable nor is it a water of the United States; the Federal Power Act is not applicable thereto; and the Federal Power Commission has no authority over said river for the following reasons:

(1) The Congress has declared that the Iowa River and necessarily its tributary, the Cedar River, "shall not be deemed a navigable water or public highway; but dams and bridges may be constructed across it", and thereby has relinquished control to the State of Iowa.

The State of Iowa plead and offered in evidence the Congressional Resolutions and Acts culminating in the Congressional Act approved August 18, 1894, (28 Stat. 356, USCA Title 33, Sec. 31) in words as follows:

> "So much of the Iowa River within the State of Iowa as lies north of the town of Wapello, and so much of said river within the State of Iowa which lies between the towns of Toolsboro and Wapello, in the County of Louisa, shall not be deemed a navigable water or public highway, but dams and bridges may be constructed across it."

(2) The power of Congress springs from the Commerce Clause of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several states". (Article I, Sec. 8). Congress has the power to declare what waters are or are not navigable waters of the United States. By said Congressional action the Federal Power Act is not applicable to and the Federal Power Commission has no jurisdiction over the Cedar River as such.

2. Whether the Federal Power Act as construed by the Federal Power Commission and by the Court of Appeals in this case is unconstitutional, or whether the action of the Commission in granting the license is an assumption of powers that are unconstitutional. The Federal Government has only the powers delegated to it by the States in the Federal Constitution. Under the Commerce clause of the Constitution, Congress has power only to regulate foreign and interstate commerce, and where no such commerce exists, there is no power. The proposed project is a single purpose project, for the generation of electric energy only, to be sold commercially by a private party, and no control or regulation of navigation or interstate commerce is involved.

Either the Federal Power Act is unconstitutional, if it be construed to extend the power of Congress over the Cedar River and over this project, such as to affirmatively authorize the construction of the project, or, the act of the Federal Power Commission in granting the license is in excess of its powers and is an unconstitutional act for the following reasons:

a. The Cedar River is an inland non-navigable water of Iowa and is not a public highway or water of the United States.

b. The proposed project is a single purpose project for the generation and sale of electric energy only, and has no

relation or connection with the preservation, betterment or development of interstate navigation or commerce.

c. The proposed generating plant will be constructed approximately 8 miles from the Cedar River and not on or near the Cedar River. Neither is it to be constructed on the Mississippi River. The plan calls for the diversion of the Cedar River by the construction of a diversion dam and the turning of the River at the dam through a canal to be constructed across land to the site where the power plant is to be constructed. The very nature of the project as shown by the undisputed record is not one in aid of navigation or of interstate commerce, and has no relationship to the fostering, perpetuation or preservation of interstate navigation or commerce.

d. The proposed project as described in the evidence and in preceding paragraph c. will destroy and forever prevent any interstate navigation or commerce from or into the Cedar River, for the reason that the lower twenty miles of the Cedar River will admittedly and without dispute, be destroyed. Also it will be physically impossible to provide interstate navigation and commerce from the Cedar River into the Mississippi River through the proposed canal for the reason that there is a vertical drop of 95 feet from the easterly end of the canal to the pool in front of the powerplant below, and it is certain that no locks can be constructed or operated to raise and lower vessels over the 95 foot drop at the eastern end of the canal. Any possible interstate navigation or commerce will be utterly and unquestionably destroyed.

e. The Federal Power Commission does not have power or authority to affirmatively authorize and to license the construction, and operation of the proposed project. The only power in the Federal Power Commission is a negative one, namely, to prevent or to regulate the dumping of water into the Mississippi River or the withdrawal of water from

the Mississippi River under any pumping arrangement which might be installed in connection with the project, so as to prevent any interference with navigation on the Mississippi River.

f. The State of Iowa has the only power, authority and jurisdiction existing over the Cedar River and the proposed project. The State of Iowa, through its laws, and particularly Chapter 469, Code of Iowa, 1946, has the sole power, jurisdiction and authority to affirmatively grant or to deny a permit to construct and operate the proposed project, subject only to the power of the Federal Power Commission to prevent, restrict or regulate the dumping of water into the Mississippi River, or the withdrawal of water from the Mississippi River, if and when the Federal Power Commission finds and determines that such will adversely affect navigation and commerce at that point on the Mississippi River.

3. Whether your Petitioners were and are entitled to have the issues heard and decided as to the power, authority and jurisdiction of the Federal Power Commission to affirmatively authorize and license the construction and operation of the proposed project in the light of and because of the propositions and reasons hereinbefore stated. Your Petitioners plead these jurisdictional and constitutional questions in the proceedings before the Commission, (Record 5, pages 6, 12, 13, 15 to 22, 29, 33) and tendered and described in the tender the evidence to sustain said propositions. (Record beginning page 22). Again after remand to the Commission of the case by this Court, your Petitioners by additional pleadings, raised said issues, (Record 5, (46, 47, 48, 56-65, 71 to 81)) and again tendered and offered proofs and evidence (Record 81, 82), all of which were rejected by the Federal Power Commission, and no opportunity was ever afforded to try out said issues.

4. Whether the findings of the Federal Power Com-

mission made in a prior and different proceeding by it, designated "DI 154", that the Commission has jurisdiction over the Cedar River and over the proposed project under the provisions of the Federal Power Act, are binding upon the Courts, and upon your Petitioners herein. The issue of the jurisdiction, power and authority of the Federal Power Commission is always available when raised, and it is always a question for the Courts to determine. The proceedings in DI 154 were ex parte, without judicial notice, and without due process, and are therefore not final and binding, and are subject to attack. In this proceeding before the Commission, and designated "Project No. 1853", your petitioners pleaded the jurisdictional issues, described the evidence available thereon in the pleadings, and tendered such evidence. Both the Commission and the United States Court of Appeals erred to the prejudice of Petitioners in denying your Petitioners a hearing thereon.

5. In the event only that this Court decides that the Commission has the power to affirmatively authorize this project, whether the Federal Power Commission ignored and violated the requirements of the Federal Power Act and particularly of Section 4(e) thereof in affirmatively authorizing and licensing the proposed project. The Court of Appeals erred in failing to consider and pass upon this question. Section 4(e) of the Federal Power Act empowers the Commission to issue licenses:

> "For the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project work *necessary or convenient for the development and improvement of navigation* and for the development, transmission and utilization of power across, along, over, or in any of the streams or other bodies of water *over which Congress has jurisdiction under its authority to regulate commerce* with foreign nations and among the several states." (Italics ours).

Further, said Section 4(e) provides that:

> "Whenever the contemplated improvement is, in the judgment of the Commission, *desirable and justified in the public interest for the purpose of improving or developing the waterway or waterways for the use or benefit of interstate or foreign commerce,* a finding to that effect shall be made by the Commission". (Italics ours).

As hereinbefore stated, the proposed project is concededly and admittedly a single purpose project, namely, for the generation and sale commercially of electric energy. The evidence unquestionably shows that no part of the project is "necessary or convenient for the development and improvement of navigation". Neither can it be stated under any excuse that the project is "desirable and justified in the public interest for the purpose of improving or developing the waterway or waterways for the use and benefit of interstate or foreign commerce". The project when constructed would destroy any possible navigation or interstate commerce into or from the Cedar River. The project is detrimental and injurious to navigation and commerce rather than beneficial. Therefore, the Federal Power Commission does not have the power and authority to license the proposed project in violation of these mandatory provisions of the Federal Power Act and particularly of Section 4(e) of the Federal Power Act.

The Federal Power Act does not empower the Commission to authorize the destruction of the lower Cedar River and the use of that River for navigation and commerce, nor does it authorize the use of the water of the Cedar River for power generation alone.

6. Whether the Federal Power Commission under the Federal Power Act has the power to grant to a private corporation for private uses, the waters of the Cedar River over the protests and objections of Iowa, especially since

the project undeniably will not benefit or aid navigation and interstate commerce, but on the contrary will be wholly destructive thereof. The Court of Appeals erred in refusing to pass upon this question, and by affirming the Order of the Federal Power Commission herein, that Court sanctioned this usurpation of power by the Commission, which we submit offends the requirements not only of the Federal Power Act, but of the Commerce Clause of the Constitution of the United States.

Iowa has the only original jurisdiction, power and authority to affirmatively license or permit the proposed project, subject only to the possible power of the Commission to prohibit or restrict the operation of the project, if it finds that it will adversely affect navigation and commerce upon the Mississippi River. The Iowa laws upon the subject are contained in Chapter 469, Code of Iowa 1946, formerly Chapter 363, Code of Iowa 1939, references to which are set out in the Appendix hereto.

7. Whether the Court of Appeals erred in its opinion in refusing to investigate and determine the charge of your Petitioners that the evidence was insufficient to sustain the findings by the Federal Power Commission, that the project is economically feasible. This question is now submitted to the Supreme Court in the event it is determined that the Federal Power Act is applicable to this project. The Court of Appeals in its Opinion refused to determine said question and as a reason therefore, stated that it could not substitute its judgment for that of the Commission upon debatable fact questions. The Court of Appeals is in error in taking this position, for the reason that the complaint of your Petitioners was and is that there is an utter absence and failure of evidence upon these economic issues, and that the Commission, because of the failure of evidence, erred in making such findings. Your Petitioners are entitled to have these questions determined from the Record.

The Commission found that the project was economically feasible, despite the fact that the Trial Examiner of the Commission who heard all of the evidence as the trier of the facts, found in his Report to the Commission, that the project was not economically feasible with present high construction costs; that there was no evidence adduced of any firm commitments for the financing of the project; that there was no evidence adduced as to any firm commitments for the sale of the energy to be generated; and that there was no evidence adduced showing any transmission line facilities available to transmit energy to prospective customers, if there be any. The Trial Examiner in his Report stated that "The issuance of a license is not justified by the Record as it now stands". These matters are set out by the Court of Appeals in its opinion, yet it abstractly refused to rule upon the sufficiency of the evidence. Economic feasibility is an important factor as to this project, because it is a single purpose project, namely, to generate electric energy to be sold commercially. Its economic success is necessary to justify the granting of the license. Your Petitioners are entitled to have these matters decided by the Court.

8. Whether the Federal Power Commission obeyed the mandate of this Court on the remand of this case to the Commission for further proceedings under the interpretation by this Court of the meaning and requirements of Section 9(b) of the Federal Power Act. If this project is subject to the Federal Power Act as assumed for the purposes of that review by this Court when this matter was before this Court previously, in *First Iowa Hydro-Electric Cooperative vs. Federal Power Commission*, 328 U. S. 152, 90 L. ed. 1143, then the Federal Power Commission should have required the promoters to submit satisfactory evidence under the provisions of Section 9(b) of the Act, that they had "complied with the requirements of the laws of the

State (of Iowa) with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license" under the Act. Upon the reopening of the case, the Commission refused to grant the petition of Iowa, among other things to take evidence under the provisions of said Section 9(b) of the Act, as interpreted by the Supreme Court on that review. (R. p. 5, (49, 52, 163)). The Commission refused to receive evidence of such compliance, and refused to give effect to a law of the State of Iowa requiring the promoters to secure a Certificate of Convenience and Necessity under the provisions of Chapter 246, Laws of the 52nd General Assembly of Iowa. (R. p. 5, (234, 235)). Attention is also again called to Chapter 469, Code of Iowa, 1946 (formerly Chapter 363, Code of Iowa, 1939) which we submit is applicable under the present record in this case. Consideration should have been given to the requirements of Chapter 489, Code of Iowa, 1946 (formerly Chapter 383, Code of 1939) requiring any operator of a transmission line to secure a franchise therefor from the Commerce Commission of Iowa. The Commission gave no effect and received no evidence upon any of these matters, and the Court of Appeals in its Opinion refused to decide said question. Your Petitioners are entitled to have these matters investigated and considered by the Commission in the light of the interpretation of Section 9(b) of the Act, if it is found by this Court that the project is subject to the Act.

9. Whether the provisions of the Act of August 14, 1946, amending the Act to Promote Conservation of Wildlife, Fish and Game, and for Other Purposes, approved March 10, 1934, 60 Stat. 1080, 16 USCA Secs. 661-666, must be given effect and compliance with the provisions thereof had before the Commission may grant a license for this project,

if this Court finds that the project is subject to the Federal Power Act. This Federal law requires that whenever waters of any stream are authorized to be impounded, diverted or otherwise controlled for any purpose by any department or agency of the United States, it shall first consult with the Fish and Wildlife Service and with the Head of such Service of the State wherein the impoundment or diversion occurs, so as to prevent loss or damage to wildlife resources. The law further requires reports and recommendations to be first received from the Secretary of the Interior and from the Head of such agency (in this case from the Iowa Conservation Commission) as to means and plans of protecting wildlife resources, which plans must be included in arriving at the cost of the project. The Commission ignored this requirement and the lower Court failed to correctly interpret the requirements of this Federal law. This conservation law means what it says and effect must be given thereto.

SUPPORTING BRIEF.

In support of this Petition for a Writ of Certiorari, your Petitioners submit the following brief:

1. The Federal Power Commission under the provisions of the Federal Power Act does not have the jurisdiction, power and authority to affirmatively authorize the construction of this project against and in spite of the protests and objections of the State of Iowa, its interested commissions, boards and agencies. The sole power of the Federal Government is that granted to it, by the States in the Commerce Clause of Section 8 of Article I of the Constitution of the United States. Congress has the power to declare what waters are navigable or are not navigable waters of the United States. Congress may accept and assume the power to regulate interstate commerce, or it may deny itself that power in particular instances, as stated by this Court in

International Shoe Co. vs. Washington, 326 U. S. 310, 315; 90 L. ed. 95, 101:

> "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." Citing cases.

Attention is called also to *Southern Pacific Co. vs. Arizona*, 325 U. S. 761, 769; 89 L. ed. 1915, 1925, where this Court said:

> "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, *** (citing cases) ***, or exclude state regulation even of matters of peculiarly local concern, which nevertheless affect interstate commerce (citing cases)."
>
> "***There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lands, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

The Congress in conformity to the above stated principles by Congressional Act relinquished to the State of Iowa the control over the Cedar River and determined therein that the Iowa River, and necessarily the Cedar River, is not a navigable water or public highway of the United States, and authorized the construction of dams and bridges on said rivers under local control. Congressional Act approved August 18, 1894 (28 Stat. 356; 33 USCA Sec. 31). Said Act is in words as follows:

> "So much of the Iowa River within the State of Iowa as lies north of the town of Wapello, and so much of said river within the State of Iowa which lies between

the towns of Toolsboro and Wapello, in the County of Louisa, shall not be deemed a navigable water or public highway, but dams and bridges may be constructed across it."

Note from an examination of the map on the last page in the Appendix hereto that the Iowa River is an inland river of Iowa, and that the Cedar River is a tributary of the Iowa River and is also an inland river of Iowa. Note further that all of the river from Toolsboro upstream is included within the exclusion stated in the Congressional Act. Toolsboro is but three miles upstream from the junction of the Iowa River with the Mississippi River. It is plain that all of the Cedar River is excluded unquestionably from any possible control by the Federal Government. There are many other matters to be submitted sustaining this proposition upon the principal presentation when this Petition for a Writ of Certiorari has been granted.

Furthermore, the proposed project is admittedly and unquestionably a single purpose project, namely, to generate electric energy for sale commercially. There is no possible way that the project can be said to be in furtherance of, in aid of, or as protecting navigation or interstate commerce. The project is completely destructive of both. The Federal Power Commission in this case is attempting to assert jurisdiction over the Cedar River because it arbitrarily declared and found, in an ex parte preliminary proceeding, that the Cedar River is a navigable water of the United States, and that the Commission therefore has jurisdiction thereof. In its Order granting the license herein, it makes the bold arbitrary statement that it finds the project will benefit navigation and interstate commerce. Such finding is arbitrary, not founded upon any evidence, and is not true. This is a flagrant assumption and abuse of power by the Commission. The project involves a complete diversion and turning of the Cedar River through a canal or new channel to be con-

structed in order to move the Cedar River eight miles across land to a point where a drop of approximately 100 feet can be obtained, at which point the power plant would be located on land and the Cedar River taken to it. The power plant is not on the Mississippi River. It is some distance from the Mississippi River, and it is proposed to dump the diverted water of the Cedar River into the Mississippi River by means of a sluiceway running down stream parallel with the Mississippi River until it can be dumped below navigation dam No. 16 into the Mississippi River. Therefore, the plant is not located upon the Mississippi River either. This is a wholly intrastate local project located upon land wholly in Iowa. The dam is to divert the river eight miles to the plant. That is the sole purpose of the diversion dam in the Cedar River.

It is submitted that the Federal Power does not extend to this project because it is a local intrastate project. Chief Justice Marshall in *M'Culloch vs. Maryland*, 4 Wheat 316, 323; 4 L. ed. 579, 605, said:

> "The Congress may not, 'under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government' ".

Again in *Ashwander vs. Tenn. Valley Authority*, 297 U. S. 288 at 326; 80 L. ed. 688 at 700, this Court said:

> " 'All America understands and has uniformly understood,' said Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheat 1, 190; 6 L. ed. 23, 68, 'The word "commerce", to comprehend navigation'. The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist."

Also, in *Ashwander vs. Tenn. Valley Authority*, supra, the question was raised as to whether the Government could

enter into the business of selling electric energy generated at the dam in this project. It was noted however, that among other things, this project was authorized by an Act of Congress to be constructed and operated by Congress (not a private corporation as in the case at bar) to develop materials for use in case of war, and also that the project would benefit navigation in the Tennessee River. In answer to the challenge of the authority of the Government to develop and sell electric energy as a by-product of this project, this Court said:

> "And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States." (297 U. S. at 340; 80 L. ed. 707.)

Further, this Court in *Carter vs. Carter Coal Co.*, 298 U. S. 238, 296, 297; 80 L. ed. 1181, 1182, said:

> "The supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal clothed by that instrument with complete judicial power, and therefore, by the very nature of the power required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the Supreme law and reject the inferior statute whenever the two conflict."

In this case this project does not involve the protection or improvement of navigation or interstate commerce, but does involve the complete destruction thereof, if any exists. The Federal Power Act cannot be found to extend the power of the Federal Power Commission to affirmatively authorize the construction of this project. If it does grant such power to the Federal Power Commission it is unconstitutional be-

cause the Federal Government does not have that kind of power to grant.

As stated the proposed project is a strictly local power development project and this Court in *National Labor Relations Board vs. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30; 81 L. ed. 893, 907, said:

> "The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system.*** Undoubtedly the scope of this power must be considered in the light of our dual system of Government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree" (301 U. S. 37; 81 L. ed. 911, 912). *** "It is said that this exercise of Federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The protective power extends to the former because it exists as to the latter." (301 U. S. 38; 81 L. ed. 912).

Attention is called also to the pronouncements of this Court upon the restrictions and limitations upon the Federal power in *Kansas vs. Colorado*, 206 U. S. 46, 88, 89; 51 L. ed. 956, 971; *United States vs. River Rouge Improvement Co.*, 269 U. S. 411, 419; 70 L. ed. 339, 345.

It has frequently been attempted to extend the power of the Federal Power Commission under misconstructions of the opinion of this Court in *United States vs. Appalachian Electric Power Co.*, 311 U. S. 377; 85 L. ed. 243. It will be noted that was an action by the United States to enjoin the

construction and maintenance of a dam in a navigable water of the United States by a private corporation for the purpose of generating and selling electricity commercially. The authority of the Government was challenged by the Company. What the Supreme Court said in that case must be viewed in the light of that approach. Obviously the United States Government has the power to prevent or to control and regulate the obstruction in the navigable river. Yet notwithstanding that the Supreme Court therein said:

> "As respondent soundly argues, the United States cannot by calling a project of its own 'a multiple purpose dam' give to itself additional powers, but equally truly the respondent cannot by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the river for commerce. To this general power, the respondent must submit its single purpose of electrical production." (311 U. S. 426; 85 L. ed. 262, 263).

In the case at bar the Cedar River is not a navigable water of the United States so declared by Act of Congress. The project will destroy any possible or assumed navigation or interstate commerce upon the river. The project is a single purpose project to generate and sell electricity. So obviously even though the Federal Government had jurisdiction over the Cedar River, it could not affirmatively authorize the construction of this project over and against the opposition of Iowa. Note in the *Appalachian* case the Government was objecting to the obstruction, not affirmatively authorizing the obstruction.

2. The Court of Appeals and the Federal Power Commission have assumed that the question of the jurisdiction, power and authority of the Federal Power Commission to affirmatively authorize the construction of this project was

settled by this Court when one phase of this case was before the Supreme Court in *First Iowa Hydro-Electric Cooperative vs. Federal Power Commission*, 328 U. S. 152; 90 L. ed. 1143. That case was on review upon a single proposition, namely, the construction and effect to be given the language of Section 9(b) of the Federal Power Act, which provided that the Commission should require an applicant for a license to present satisfactory evidence of compliance with the requirements of the applicable laws of the State of Iowa requiring a permit from the State Executive Council of Iowa as a prerequisite to the right of the Federal Power Commission to grant a license under the Federal Power Act. That was the sole question involved. The Federal Power Commission had denied the application for a license on this ground. The applicant took the case on review to the Court of Appeals of the District of Columbia, which Court affirmed the decision of the Power Commission, denying the license, and it was brought on review before this Court by writ of certiorari, and this Court reversed the Court of Appeals for the District of Columbia. It will be noted from a reading of the Opinion by this Court in that case, that no appeal or review was sought upon the jurisdiction, power or authority of the Federal Power Commission over the Cedar River and this project. The whole question was on the interpretation and construction to be given Section 9(b) of the Act. The Supreme Court in its Opinion assumed for the purposes of that case, that jurisdiction, power and authority existed in the Federal Power Commission over the project and over the river. No challenge was made on that question. The State of Iowa had won before the Federal Power Commission. The State of Iowa had won before the Court of Appeals of the District of Columbia. The State of Iowa had not sought a review. Therefore, the State of Iowa did not appeal and did not assert any grounds for review upon the question of the jurisdiction, power and authority of the

Federal Power Commission. As stated, the case proceeded on the assumption that the Federal Power Act was applicable. The recitals in the Opinion are all to that effect. All that this Court actually decided was that the Federal Power Act applied to any proposal to construct a project in a navigable water of the United States, and everything that was said in that Opinion was based upon that assumption. No such proposition was considered by the Court of Appeals, and it was not raised by any party on the presentation to the Supreme Court. This Court has consistently taken the position that no point will be considered by this Court upon a Petition for Certiorari unless that point was considered by the Court below, or presented in the Petition for Certiorari or in the response thereto.

Zellerbach Paper Co. vs. Helvering, 293 U. S. 172, 182; 79 L. ed. 264, 270;
Helvering vs. Wood, 309 U. S. 344, 349; 84 L. ed. 796, 799;
Washington, Virginia and Maryland Coach Co. vs. National Labor Relations Board, 301 U. S. 142, 146; 81 L. ed. 965, 969.

Counsel for the Respondent and the Intervenor contend that the findings by the Federal Power Commission in the former and prior proceeding designated before the Federal Power Commission as D.I. 154, in which the Commission found that it had jurisdiction over the Cedar River as a navigable water of the United States and over this project, that that is an adjudication, and that your Petitioners are bound thereby. That position is not sustained by the authorities. This question was before the Fourth Circuit Court of Appeals in *Carolina Aluminum vs. Federal Power Commission*, 97 Fed. (2) 435. Justice Parker in his opinion stated that the Declaration of Intention was filed to build a hydroelectric power project on the Yadkin River in North Carolina. After hearing the Commission held "That the interests of interstate or foreign commerce would be affected by such

proposed construction of the said project". As in the case at bar, no order was entered requiring the Petitioner to take or refrain from any action whatsoever, or granting or denying any form of relief. A petition for a rehearing was denied, and a Petition for Review was then filed in the Court and the Court ruled that it was given no power by Section 313(b) to review a mere finding as distinguished from an order of the Commission. This principle was affirmed in *Federal Power Commission vs. Metropolitan Edison Co.*, 304 U. S. 375, 82 L. ed. 1408. Also see *Houston National Gas Corporation vs. Securities and Exchange Commission*, 100 F. 2d 5, 6.

The findings made in D.I. 154 by the Commission were ex parte, without judicial notice or hearing, and did not preclude your petitioners from raising issues as to the jurisdiction, power and authority of the Commission to affirmatively authorize the construction of this project over the objections and protests of petitioners in this proceeding, known as Project No. 1853, before the Commission. As stated, these issues were pleaded time and time again and the Commission persistently refused to permit evidence to be taken upon it and refused to hear and determine the issues thus pleaded.

3. The Court below refused to pass upon the issue presented that the findings on economic feasibility by the Federal Power Commission were not sustained by any evidence. The Federal Power Commission found that the project was economically feasible; that there was evidence justifying the finding that the project could be financed, and that the project could be operated at a profit. The trier of the facts, the Trial Examiner of the Commission, found that there was not sufficient evidence to sustain any of these propositions, and recommended that the license be denied. The Court of Appeals disposed of the issue by stating that it could not substitute its judgment for that of the Commission

on debatable questions of fact. There are no debatable questions of fact upon these propositions. There is no evidence to show that there are any customers available to buy the current to be generated, nor to show the project could be operated at a profit. Neither is there any evidence to show that any financial institution or other party is willing to undertake the financing of the project, which it will be noted, must be financed completely one hundred percent by the sale of bonds to the public. There are no commitments or semi-commitments shown in the record. Therefore, the Court of Appeals erred in not passing upon this matter. The rule is well established that the Court must determine whether there is evidence which is legally sufficient for administrative action. If it finds that there is sufficient evidence the Court may not weigh it and the fact finding of the Commission stands, but if there is no evidence, the Court must say so and set aside the fact finding of the Commission.

Webre Steib Company vs. Commissioner of Internal Revenue, 324 U. S. 164, 173; 89 L. ed. 819, 828;
Consolidated Edison Co. vs. National Labor Relations Board, 305 U. S. 197, 229; 83 L. ed. 126, 140.

4. The Federal Power Commission was required by the Supreme Court on the remand of this case to require applicant to present satisfactory evidence of complying with the provisions of Section 9(b) of the Federal Power Act, as interpreted and construed by the Supreme Court in *First Iowa Hydro-Electric Cooperative vs. Federal Power Commission, et al*, 328 U. S. 152; 90 L. ed. 1143. That case was reviewed by the Supreme Court solely upon the question as to what was required and what was meant by the provisions of Section 9(b) of the Act. This Court held that the Commission had previously followed and had adopted an erroneous interpretation of Section 9(b) of the Act. The Commission refused and failed to take additional evidence although demand was made therefor by your Petitioners.

There are several laws of the State of Iowa which are applicable under the provisions of Section 9(b) of the Act.

The Federal Power Commission failed to give effect to and the Court of Appeals erred in refusing to find that the Commission failed to give effect to certain Iowa statutes as required by Section 9(b) of the Federal Power Act. Section 469.30, Code of Iowa 1946, formerly Section 7769, Code of Iowa 1939, requires the applicant to secure a permit from the State Commission to flood public highways or state-owned lands. The applicant must show that it has a permit from the State Highway Commission because beyond dispute and admittedly the main reservoir will flood several primary highways and main highways. Further, Chapter 246 of the laws of the 52nd General Assembly of Iowa requires that the Intervenor herein must first secure a Certificate of Convenience and Necessity from the Executive Council of the State of Iowa in order to engage in the business in Iowa of maintaining and operating a hydro-electric generating plant. That is a law referred to in Section 9(b) of the Act, and the Commission and the Court failed to give consideration thereto. See the law set out in Petitioners' Record below, Page 234.

Further, the project plan does not call for any transmission lines. It will be necessary for the applicant or someone else to secure a franchise to operate a transmission line from the plant before the electric energy can be sold and distributed. Section 489.1, Code of Iowa 1946, formerly Chapter 383, Code 1939, requires any individual or Company which desires to erect, maintain or operate any transmission lines along any public highways to first secure a franchise from the State Commerce Commission. That statute was also ignored.

Your Petitioners are entitled to have the Courts determine whether the failure of the applicant to follow the

requirements of Section 9(b) of the Federal Power Act as interpreted by this Court, constitutes error.

5. There are several other propositions which have been set out in the questions presented for review. However, we will not extend this brief by making any further presentation in connection therewith. We believe that we have stated sufficient supporting information herein to justify and warrant the Court in granting the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit. On the submission in chief all of these matters can and will be more elaborately presented.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX TO BRIEF.

Provisions from Iowa Law.

The following excerpts from the Iowa Law, Chapter 363, Code of Iowa 1939, now Chapter 469, Code of Iowa 1946 are sufficient for the purposes of this review:

> "469.1 Prohibition—permit. No dam shall be constructed, maintained or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."

Section 469.2 prescribes what an application for permit must contain.

Section 469.3 prescribes notice of hearing.

Section 469.4 prescribes the hearing.

> "469.5 When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe."